Supreme Court, U.S.
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In the Supreme Court of the United States

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, AND ORNAMENTAL IRON WORKERS, LOCAL UNION NUMBER 55, AND VAL HELLDOBLER,
Petitioners,

v.

WALCHER & FOX, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is there jurisdiction under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 or the Supplemental Jurisdiction of Federal Courts, 28 U.S.C. § 1367(A), over the employer's action against the labor organization alleging fraudulent misrepresentation?

2. Is an employer's action against a labor organization for fraudulent misrepresentation of the terms of a collective bargaining agreement preempted by the primary jurisdiction of the National Labor Relations Board?

3. Is an action by an employer against a labor organization for fraudulent misrepresentation of the terms of the collective bargaining agreement preempted by Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185?

4. Is a labor organization's business representative immune from suit by an employer for fraudulent misrepresentation of the terms of a collective bargaining agreement pursuant to Section 301(b) of the Labor Management Relations Act, 29 U.S.C. § 185?

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Petitioners International Association of Bridge, Structural and Ornamental Ironworkers, Local Union No. 55 and Val Helldobler have filed a Petition for a Writ of Certiorari. Respondent Walcher & Fox, Inc. respectfully requests that this Court refuse to issue a Writ of Certiorari. The opinion of the Sixth Circuit Court of Appeals does not conflict with opinions of this Court or of other Circuit Courts of Appeal and Petitioners have failed to establish sufficient grounds for the issuance of a Writ.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 270 F.3d 1018 (6th Cir. 2001) and is reproduced in the Appendix to the Petition for a Writ of Certiorari at Appendix pg. 1a. The Memorandum Opinion of the United States District Court for the Northern District of Ohio denying Third Party Defendants-Petitioners' Motion to Dismiss the Third Party Complaint, is unreported and is reproduced in the Petition for Writ of Certiorari, beginning at Appendix pg. 23a. The Memorandum Opinion of the United States District Court for the Northern District of Ohio, denying Plaintiff Northwestern Ohio Administrators, Inc.'s Motion for Summary Judgment and granting Defendant-Respondent's Motion for Leave to File a Third-Party Complaint is unreported and is reproduced in the Petition for Writ of Certiorari, beginning at Appendix pg. 36a.

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was issued on November 6, 2001. This Court has jurisdiction to consider this Petition pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 provides as follows:

> **Suits by and against labor organizations**
>
> **(a) Venue, amount, and citizenship**
>
> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
>
> **(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments.**
>
> Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued by an entity and on behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and

against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process

The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of questions of agency

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

STATEMENT OF THE CASE

This case arises from a suit brought by Northwestern Ohio Administrators, Inc. (hereinafter referred to as "NOA") against Walcher & Fox, Inc. (hereinafter referred to as "W&F"). NOA brought suit against W&F pursuant to the provisions of the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et. seq.*, and Section 301 of the Labor Management Relations Act (hereinafter referred to as the "LMRA"), 29 U.S.C. § 185. Specifically, NOA sought to compel a payroll audit on behalf of several fringe benefit funds as provided in five separate "project only" agreements entered into between W&F and the Third Party Defendant, International Association of Bridge, Structural, and Ornamental Ironworkers, Local Union No. 55 (hereinafter referred to as "Union").

W&F is a construction subcontractor primarily engaged in the erection of pre-engineered steel buildings. The Union is a labor organization whose craft jurisdiction encompasses the fabrication, production, erection and construction of all iron, steel and associated metals in its geographical area. Petitioner Val Helldobler (hereinafter referred to as "Helldobler") was a business agent for the Union.

On several occasions in September 1996, Helldobler approached the Company at its Arkam Steel project site in Temperance, Michigan, urging it to sign a labor agreement. W&F repeatedly declined these invitations specifically because it was a new company and, as such, could not afford to pay all of its employees union scale wages and benefits.

On September 18, 1996, Helldobler suggested W&F enter into a more limited labor contract covering only one or

two union journeyman to be provided by the Union. W&F and the Union thus entered into a one-time, project specific agreement covering the two union ironworkers to be provided for the Arkam Steel project. W&F and the Union entered into four additional "project only" agreements under substantially the same terms, conditions and limitations as set forth on the Arkam project.[1]

In accord with the understanding between W&F and the Union, the Union provided the agreed upon manpower for each project and W&F made fringe benefit payments only for the union members employed. In September 1997, long after each of the five project only agreements at issue had expired, NOA demanded that W&F submit to a payroll audit of all of its employees. W&F refused and NOA filed the underlying lawsuit alleging that W&F's refusal to submit to a payroll audit for all of its employees, and its refusal to remit contributions on behalf of all of its employees, constituted a breach of the five agreements.

On April 30, 1999, NOA moved the District Court for partial summary judgment, seeking judgment as a matter of law that the scope of the five project agreements included all employees as opposed to only those employees referred by the Union. The District Court denied NOA's motion on the express basis that the agreements were ambiguous due to the handwritten notations on the face of the agreements.

Simultaneously with the District Court's denial of NOA's motion for partial summary judgment, the Court

[1] Another of the agreements, known as the Crabb Road Project Agreement included even more detailed language limiting the scope of the agreement to "1 Journeyman and 1 Apprentice 8th man weekly benefit pay."

granted W&F's motion for leave to file a third party complaint against the Union and Helldobler under Section 301 of the LMRA, 29 U.S.C. § 185 and under Ohio law. In the event the District Court held W&F liable for contributions on its own non-union ironworkers, as apposed to the more limited union referred ironworkers. The third party complaint charged the Union and Helldobler with the following state law causes of action: fraud in the execution, fraud in the inducement, fraudulent misrepresentation, and negligent misrepresentation, contribution and indemnification should the District Court determine that fringe benefit contributions were owed on all ironworkers. On October 21, 1999, the District Court denied a motion to dismiss the third party complaint, filed by the Union and Helldobler.

On November 22, 1999, the District Court conducted a bench trial limited to the issue of the scope of the coverage of the agreements - whether the project only agreements covered merely those ironworkers referred by the Union or all ironworkers employed by W&F. The District Court held that, notwithstanding the handwritten notations on the project agreements that memorialized the parties' agreement that W&F need only make fringe benefit contributions on behalf of employees referred by the Union, NOA was entitled to collect the contributions for all of the Company's employees who worked under the project agreements. The District Court certified all issues for interlocutory review, which were accepted by the Court of Appeals.

The United States Court of Appeals for the Sixth Circuit affirmed the District Court's decision in all respects. First, the Court of Appeals affirmed the District Court's decision that NOA had a right to collect contributions for all of W&F's employees. That issue is the subject of a conditional cross-petition for a writ of certiorari, filed by

W&F with this Court. Second, the Court of Appeals affirmed the District Court's holding that it had jurisdiction over the third party complaint; that the allegations set forth in the third party complaint were not preempted by federal labor law as set forth in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959); that the third party complaint was not preempted by application of Section 301 of LMRA, 29 U.S.C. § 185; and that Petitioner Helldobler was not immune from suit as an individual pursuant to provisions of Section 301(b) of the LMRA, 29 U.S.C. § 185(b).

Petitioners now seek review of each of the final four issues affirmed by the Sixth Circuit Court of Appeals. Respondent files this Brief in Opposition to that Petition and respectfully requests that this Court refuse to issue a Writ of Certiorari on these issues.

REASONS FOR DENYING THE WRIT

I. THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DOES NOT CONFLICT WITH RELEVANT PRECEDENT ESTABLISHED BY THIS COURT AND DOES NOT CONFLICT WITH THE DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS.

A. This Court's Decision in *Textron* Does Not Conflict With The Sixth Circuit's Opinion.

Petitioner claims that the Sixth Circuit's decision in this case conflicts with this Court's decision in *Textron Lycoming Reciprocating Engine Div. v. UAW*, 523 U.S. 653 (1998). *Textron* is readily distinguishable from this case. In this case, Plaintiff NOA filed the action, alleging a breach of

contract. Defendant-Respondent W&F then filed a third party complaint alleging fraud and based the Court's jurisdiction upon both 29 U.S.C. § 185 and the federal courts' supplemental jurisdiction as set forth in 28 U.S.C. § 1367(A). The Sixth Circuit then decided, without squarely addressing the issue of jurisdiction under § 185(a), that the Court clearly had supplemental jurisdiction over W&F's third party claim.

Unlike this matter, the sole question presented for review in *Textron* was whether federal courts have subject matter jurisdiction of a claim of fraud under 29 U.S.C. § 185(a). There was no consideration of a federal court's supplemental jurisdiction to hear third party claims based upon state law. In *Textron*, the union signed a collective bargaining agreement, which stated that the union could not strike for any reason. The union and employer also signed a separate memorandum that required the employer to give the union notice before it subcontracted out any work that would otherwise have been performed by union members. Before signing the documents, the union inquired into any plans to subcontract work, but no plans were revealed by the employer.

Shortly after the documents were signed, the employer subcontracted out work, resulting in the loss of the jobs of the majority of union employees. The union argued that federal courts had jurisdiction over its fraud claim under 29 U.S.C. § 185(a). This Court determined that because there was no allegation of a breach of the contract, there could be no jurisdiction under 29 U.S.C. § 185. In addition, this Court's decision in *Textron* specifically allowed for jurisdiction in the situation presented here: "Thus, if, in the course of deciding whether a plaintiff is entitled to relief for the defendant's alleged violation of a contract, the defendant interposes the affirmative defense that the contract was invalid, the Court

may, consistent with Section 301(a) [29 U.S.C. § 185(a)], adjudicate that defense." *Textron* at 658.

Thus, the Sixth Circuit's decision in this matter does not conflict with *Textron* as *Textron* did not consider jurisdiction under Section 185 where a breach of a collective bargaining agreement had already been asserted nor did it consider whether a federal court has supplemental jurisdiction over such a fraud claim. As such, there is no basis for this Court's review of this issue.

B. The Sixth Circuit Opinion Does Not Conflict With This Court's Decision In *Garmon* And Its Progeny.

Petitioners also argue that the Sixth Circuit's decision directly conflicts with this Court's *Garmon* line of cases and with the decisions of other Courts of Appeals. *See*, *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). In fact, there has been little circuit court case law on the precise type of action at issue in this case. Petitioners claim that the Sixth Circuit's decision in this matter is in direct conflict with the decision of the Seventh Circuit in *Talbot v. Robert Matthews Distributing*, 961 F.2d 654 (7th Cir. 1991) and the decision of the Eleventh Circuit in *Parker v. Connors Steel Co.*, 855 F.2d 1510 (11th Cir. 1988). However, neither of these cases speaks directly to the third party claims asserted by Respondent. Both *Talbot* and *Parker* dealt with claims of fraud arising out of negotiations between the employer and a validly recognized collective bargaining representative.

For example, in *Parker*, the basis for the employees' state law fraud claim was that the company fraudulently obtained concession agreements by representing that it would

keep a steel plant open if the employees granted the concessions. The employees alleged that the company intended to close the plant from the very beginning of the negotiations and fraudulently obtained the concessions in order to reduce the costs associated with the plant closing. *Id.* at 1515.

This case is entirely different. The fraud claims are asserted as a third party claim after the pension funds sued for violation of a project labor agreement. As is fully detailed by the Sixth Circuit, there was no established collective bargaining relationship, as there was in *Talbot* and *Parker*.

The issue herein, whether an employer may assert fraud claims asserted in the context of enforcement of a project labor agreement, has rarely been dealt with by the Circuit Courts of Appeal. As noted by the Sixth Circuit, its decision in this case is consistent with the only other Circuit Court of Appeals to have squarely addressed the issue. *See*, *Operating Engineers Pension Trust v. Wilson*, 915 F.2d 535 (9th Cir. 1989); *International Brotherhood of Teamsters v. American Delivery Service Co., Inc.*, 50 F.3d 770 (9th Cir. 1995).

In *Wilson*, the Ninth Circuit considered whether the union fraudulently induced the employer to enter into a project labor agreement. The Court found there was no *Garmon* preemption, noting the distinction that the Sixth Circuit seized upon in this case, that in the context of a project labor agreement, there is no continuing collective bargaining relationship and, therefore, no *Garmon* preemption. *Id.* at 540. *See also American Delivery Service*, 50 F.3d at 774 (claims for fraud in the inducement are "not swept by *Garmon* into the primary jurisdiction of the NLRB.").

There is also no direct conflict between the Sixth Circuit's decision and this Court's decisions in *Garmon* and its progeny. None of the Court's decisions in this line of cases speaks directly to the preemption of claims of fraud in the inducement, fraud in the execution or fraudulent misrepresentation arising out of the execution of a project labor agreement. As fully set forth *supra*, the only other Circuit Courts of Appeal to have addressed this specific issue held exactly as the Sixth Circuit held in this case; that the policies underlying *Garmon* preemption do not warrant preemption in this context. Thus, there is no direct conflict with this Court's *Garmon* line of cases that would warrant review by this Court.

C. The Sixth Circuit's Opinion Is Not In Conflict With This Court's Section 301 Preemption Jurisprudence.

Petitioners next claim that the Sixth Circuit's decision is in conflict with this Court's case law governing preemption under Section 301 of the Labor Management Relations Act ("LMRA"). To ensure a unified body of federal law regarding the interpretation and enforcement of collective bargaining agreements, this Court has held that certain state law causes of action must be preempted where the determination of those causes of action require interpretation and enforcement of collective bargaining agreements. *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985); *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988).

In this case, the Sixth Circuit, relying upon *Lingle*, held that Respondent's third party claims did not require interpretation of a collective bargaining agreement or even of the employer participation Agreements themselves. "The

relevant inquiry here concerns the representations made by the Union and/or Helldobler at the time the project agreements were executed, not any term of the Agreements themselves." (Opinion of the United States Court of Appeals for the Sixth Circuit, attached to Petition for Writ of Certiorari at p. 20a). Thus, this Court's Section 301 jurisprudence is in no way impacted.

To the contrary, the Sixth Circuit's decision is consistent with *Lingle*. In *Lingle*, this Court refused to preempt a state law claim for retaliatory discharge based upon Section 301. In so holding, a unanimous Court held that even if the state claim requires a court to discuss and evaluate the same facts as it would when interpreting the agreement, so long as the court is not actually interpreting the agreement, there is no preemption. *Id.* at 407. In this case, the Sixth Circuit directly followed the teaching of *Lingle* and determined that interpretation of a collective bargaining agreement was not necessary in this matter.

Rather than there being any conflict with this Court's Section 301 jurisprudence, Petitioners simply disagree with the factual analysis of the District Court and the Court of Appeals. Neither the Court of Appeals nor the District Court in any way diverges from this Court's *Lingle* decision. In sum, Petitioners' disagreement with the Sixth Circuit's factual analysis is not a sufficient basis to warrant this Court's review.

D. The Sixth Circuit's Opinion Is Not In Conflict With This Court's Decision In *Atkinson* Or With Ohio Law.

Finally, Petitioners claim that the Sixth Circuit's decision that Petitioner Helldobler is not immune from suit is

somehow contrary to this Court's decision in *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962). In *Atkinson*, this Court held that individual union members and officers generally are immune from suit under Section 301(b) of the LMRA. However, the Court also clearly explained in *Atkinson* that the immunity for individuals is only an immunity from personal liability for wrongs committed by the union, not the individuals. Id. at 247-248 ("[w]hen Congress passed Section 301, it declared its view that only the union was to be made to respond for union wrongs, and that the union members were not to be subject to levy."). The *Atkinson* Court specifically stated, "We therefore do not reach the question of whether the [complaint] would state a proper Section 301(a) claim if it charged unauthorized individual action." *Id.* at 249, n.7 (emphasis added). Thus, there cannot possibly be a conflict between the Sixth Circuit's decision not to immunize Helldobler and this Court's *Atkinson* decision. Likewise, Petitioners make no attempt to establish any conflict in the circuits on this issue.[2]

Petitioners also argue that the Sixth Circuit's decision that Helldobler was not entitled to immunity is in conflict with Ohio law. The Ohio law claimed by Petitioners to be in conflict with the Sixth Circuit's decision was thoughtfully considered by the Sixth Circuit and was found to be wholly inapplicable. The Sixth Circuit chose not to follow the two Ohio appellate court opinions cited by Petitioners because those decisions were limited to the question of whether a

[2] In this case, the Sixth Circuit joined the Third Circuit in concluding "that a state law claim brought against a union officer that does not implicate a collective bargaining agreement covered by Section 301(a) does not give rise to Section 301(b) immunity. When Section 301(a) is inapplicable, the immunity provided by Section 301(b) is also inapplicable." *Felice v. Sever*, 985 F.2d 1221, 1231 (3rd Cir. 1993).

union's attorney was an agent of the union and therefore immune from suit for malpractice by the union member. *See, Sellers v. Doe*, 650 N.E. 2d 485 (Ohio App. 1994); *Collins v. Lefkowitz*, 584 N.E. 2d 64 (Ohio App. 1990).

Further, the Sixth Circuit found that the immunity at issue in the two Ohio appellate cases was immunity from actions brought under Section 301 for "violations of contracts between an employer and a labor organization." This is distinguishable from the instant action, where the fraud claim is not premised upon a violation of a contract. Finally, the Sixth Circuit was in no way bound to follow these Ohio appellate court opinions. "[T]he State's highest court is the best authority on its own law. If there be no decision by that court, then federal authorities must apply what they find to be the state law after giving 'proper regard' to relevant rulings of other court of the State." *Commissioner of Internal Revenue v. Estate of Bosch*, 387 U.S. 456, 465 (1967).

There being no conflict between the Sixth Circuit's opinion and this Court's decision in *Atkinson* and no conflict with controlling Ohio law, Petitioners have wholly failed to establish any basis for review of Petitioner Helldobler's immunity under Section 301.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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